



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Brown County Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206677

Pursuant to petition filed October 31, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Brown County Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Tuesday, December 13, 2022 at 09:30 AM at Green Bay, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301
By: Sharon Johnson

Respondent:

██████████
██
██████████
████████████████
████████████████████

Did Not Appear

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Brown County who has received FS benefits, with occasional gaps in eligibility, since 2010. From at least January 2022 through March 2022, she was the sole member of her FS household.
2. Respondent was notified in writing several times of her obligation to provide accurate information to the agency, of the prohibition on using other people's Quest Cards, and of the potential consequences for violating those rules.
3. [REDACTED] is a resident of Brown County who received FS benefits from February 2021 through July 2021.
4. [REDACTED] was incarcerated from January [REDACTED], 2022 through at least March [REDACTED], 2022.
5. On January 20, 2022, Respondent contacted the agency, falsely identified herself as [REDACTED], and filed an application for FS in his name. That application was approved and benefits were issued to Respondent from January through March 2022.
6. The FS benefits issued to [REDACTED] were used to make multiple purchases while he was incarcerated. The purchases were made both from Green Bay area retailers and via Internet.
7. On November 4, 2022, the agency prepared an Administrative Disqualification Hearing Notice alleging that Respondent applied for FS benefits in [REDACTED] name while he was in jail and us[ed] his Quest card for non-food unit members.”.

DISCUSSION

An intentional program violation (IPV) of the FoodShare (FS) program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An individual who commits an IPV can be disqualified from participation in the FS program. The length of the disqualification period depends, in part, on the nature of the IPV. See 7 C.F.R. § 273.16(b). Generally, an individual will be disqualified for twelve months after committing her or his first IPV. See 7 C.F.R. § 273.16(b)(1)(i). The agency can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

An IPV can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1.

When an administrative disqualification hearing is scheduled and the respondent does not appear, the hearing shall nevertheless proceed if the respondent cannot be located or fails to appear without good cause. See 7 C.F.R. §273.16(e)(4). Here, the agency demonstrated that it sent a hearing notice to Respondent at her preferred mailing address and that it notified Respondent by telephone that she should be sure to check her mail. The notice instructed Respondent to contact the undersigned administrative law judge (ALJ) with a telephone number at which Respondent would be available at the date and the time of the hearing. The respondent did not do so and the ALJ was unable to reach her for the hearing at the number associated with her agency case file. Because Respondent did not appear and has not subsequently claimed a good cause reason for not attending the hearing, the Division of Hearings and Appeals must determine whether the respondent committed an IPV based solely on the evidence that the agency presented at hearing.

To establish, at hearing, that a FS recipient has committed an IPV, the petitioner must provide the following two separate elements through the presentation of clear and convincing evidence: (1) the recipient committed a program violation; and (2) the recipient intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977).

Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Pursuant to federal regulation, eligible food program benefits may be used only by a FS household or by an individual the FS household selects to purchase eligible food *for the household*. 7 C.F.R. §274.7(a). And, pursuant to state statute, an “unauthorized person” is prohibited from knowingly using FS benefits. Wis. Stat. §946.92(2)(f). “Unauthorized person” is defined to include a person who is not an eligible person. Wis. Stat. §946.92(2)(e)3. Consistent with the above-cited federal regulation and state statute, FS policy states:

The cardholder is the only person that can make authorized purchases on the QUEST card, unless he or she verbally authorizes another person to make purchases on their behalf for their assistance group.

[Emphasis added.] *FoodShare Wisconsin Handbook* §7.3.2.4.

The agency here contended that Respondent committed an intentional program violation by using [REDACTED] name to apply for FS and by then using those FS benefits for non-food unit members. The agency produced reports showing that both Respondent and [REDACTED] were issued FS benefits on different cases from January through March 2022; that several balance inquiries were made on [REDACTED] Quest card account while he was incarcerated; that many of those inquiries were made from telephone numbers that Respondent had previously provided to the agency; and that benefits issued to [REDACTED] were spent several times between January and March 2022 (i.e., while he was incarcerated).

In addition, Sgt. Michael Horst of the Brown County Sheriff’s Department, who was assigned to investigate this matter on the agency’s behalf, appeared at hearing and offered testimony. Sgt. Horst testified that he spoke with Respondent by telephone on June 1, 2022 and that during that conversation, she acknowledged applying for benefits in Respondent’s name though she denied spending the benefits. The agency also produced the written report that Sgt. Horst prepared regarding his investigation which includes a note of the telephone number that he reached Respondent at on June 1, 2022. That telephone number matches a telephone number that was used to check [REDACTED]’s FS balance on four occasions during his incarceration, as shown on the balance inquiry report.

Sgt. Horst’s written report also includes the following partial transcript that he prepared of a recorded telephone conversation between Respondent and [REDACTED] that occurred while [REDACTED] was incarcerated:

Respondent: I got your, uhm, I did your food stamps thing.

[REDACTED]: Yeah?

Respondent: Yeah.

[REDACTED]: [laughing] You sounded like [REDACTED]?

Respondent: No!

[REDACTED]: Ah, you just sounded like [yourself]?

Respondent: Yeah.

[REDACTED]: Is my s[REDACTED]t reinstated?

The best evidence of that conversation would have been the recording itself accompanied by a telephone log showing the date and time of the conversation and the originating telephone number.

Nevertheless, based upon the record as a whole, I find that the agency has established by clear and convincing evidence that the respondent applied for benefits using [REDACTED] name and that she either used or allowed his card to be used for the benefit of someone other than [REDACTED] while he was incarcerated.

Finally, I note that the agency provided robust evidence that Respondent was notified on multiple occasions that it was against program rules to use FS benefits issued to someone else, of her obligation to be truthful with the agency, and of the consequences for intentionally breaking program rules. Respondent did not appear at this hearing to rebut or explain the agency's evidence and there is nothing in the record to suggest that Respondent's actions were accidental or done without knowledge of program rules.

Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate the rule that prohibits FS benefits from being used for the benefit of anyone outside the FS household. Wis. Stat §946.92(2)(f).
3. The respondent made false or misleading statements by applying for FS in another person's name.
2. The violations specified in Conclusions of Law Nos. 1 and 2 are the first such violations committed by the respondent.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

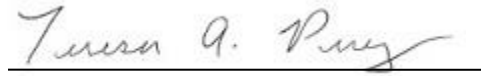
In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

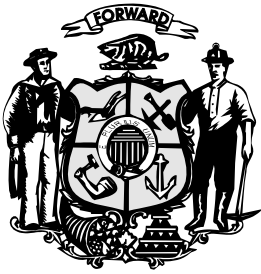
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 10th day of February, 2023

A handwritten signature in dark ink, appearing to read "Teresa A. Perez", is written over a horizontal line.

\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Medicaid Services - email
Sharon Johnson - email



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The preceding decision was sent to the following parties on February 10, 2023.

Brown County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]